

Fourth Supplement to Memorandum 2009-34

**Statutes Made Obsolete by Trial Court Restructuring: Part 5
(Staff Draft Tentative Recommendation)**

The Commission just received a letter from Frederick Bennett, Court Counsel of the Los Angeles County Superior Court. His letter is attached as an exhibit. The staff appreciates his comments.

On behalf of the court, Mr. Bennett comments on the proposed amendments in the staff draft tentative recommendation that relate to court-appointed experts, interpreters, and translators (Evid. Code § 731; Gov't Code §§ 26806, 68092, 69894.5).

Court-Appointed Experts

The Los Angeles County Superior Court expresses concern with the proposed revisions of Evidence Code Section 731, which relates to court-appointed experts. The court's concern is essentially the same as the concern raised by the General Counsel of the Shasta County Superior Court, which is discussed in the Third Supplement to Memorandum 2009-34.

The staff believes that the new approach presented in the Third Supplement adequately addresses this concern. Accordingly, **for purposes of preparing a tentative recommendation, the staff continues to recommend that approach.**

Interpreters and Translators

The Los Angeles County Superior Court has several concerns with the proposed amendments that relate to interpreters and translators. The issues are complex, and require careful analysis. As a result, the staff needs additional time to analyze the concerns. Furthermore, it would be useful to evaluate the concerns alongside comments from other sources.

Accordingly, **for purposes of a tentative recommendation, the staff recommends sticking with the approach to interpreters and translators that is presented in the staff draft.**

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

If the Commission circulates a tentative recommendation in the form recommended, the Commission should consider the attached comments from the Los Angeles County Superior Court alongside other comments it receives on the interpreter and translator provisions in the tentative recommendation.

Respectfully submitted,

Catherine Bidart
Staff Counsel

Barbara Gaal
Chief Deputy Counsel



FREDERICK R. BENNETT
COURT COUNSEL

111 NORTH HILL STREET, SUITE 546
LOS ANGELES, CA 90012-3014
(213) 893-1224 Fax: (213) 625-3964
e-mail: FBennett@LASuperiorCourt.org

Superior Court of California County of Los Angeles

August 27, 2009

Via Mail, Email and Facsimile to (916) 739-7072 and (650) 494-1827

Catherine Bidart
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Rm D-2
Palo Alto, CA 94303-4739

Re: Law Revision Commission Study on Statutes Made Obsolete by Trial Court
Restructuring (Part 5).

Dear Ms. Bidart:

On behalf of the Los Angeles Superior Court, I am forwarding these comments to your Staff Memorandum, dated July 20, 2009, identified as Study J-1404, for consideration by the Commission at its public meeting on August 28, 2009.

Experts in Criminal and Juvenile Proceedings

The proposed change to Evidence Code section 731 is based upon the incorrect assumption that the costs of experts in criminal and juvenile cases appointed at the request of counsel for the parties is a court operation cost. Only costs for "court-appointed expert witness fees (**for the court's needs**)" and "court-ordered forensic evaluations and other professional services (**for the court's own use**)" [emphasis added] are court operation cost defined in California Rule of Court 10.810(d), Function 10. Rarely are such experts appointed "for the court's own use" in criminal and juvenile cases. Most experts in criminal and juvenile cases are appointed at the request of court appointed counsel for indigent defendants or for the prosecutor, as permitted by Evidence Code section 730, which authorizes the court to appoint such experts and to fix the compensation thereof for experts "required by the court **or by any party to the action.**" [Emphases added.] Accordingly, the only appropriate change to Evidence Code section 731 would be to amend subdivision (a) thereof to read:

"(a) In all criminal actions and juvenile court proceedings, the compensation fixed under Section 730, other than court appointed experts for the court's own needs and use, shall be a charge against the county in which such action or proceeding is pending and shall be paid out of the treasury of such county on order of the court."

Catherine Bidart, Staff Counsel, California Law Revision Commission

Re: Law Revision Commission Study on Statutes Made Obsolete by Trial Court
Restructuring (Part 5)

August 27, 2009

Page: 2

The cost of experts appointed for the courts use are clearly a court operation cost which is properly chargeable to the court. However, the cost of experts requested by the county public defender, county alternate public defender, court appointed counsel for the indigent or by the prosecutor are properly county charges. *See* Penal Code section 987.2(a): "In any case in which a person, including a person who is a minor, desires but is unable to employ counsel, and in which counsel is assigned in the superior court to represent the person in a criminal trial, proceeding, or appeal, the following assigned counsel shall receive a reasonable sum for compensation **and for necessary expenses**, the amount of which shall be determined by the court, **to be paid out of the general fund of the county**: [hereafter are listed the public defender, alternate public defender, and panels of private counsel that may exist in each county; emphasis added]. *See also*, Government Code section 29602, which provides that "[t]he expenses necessarily incurred ... for ... services in relation to criminal proceedings for which no specific compensation is prescribed by law are county charges."

In Los Angeles County, and likely in many other counties, the longstanding practice is for public defenders, alternate public defenders, court appointed counsel for the indigent, and, in some cases, prosecutors, to seek appointment of necessary experts for defense of their clients pursuant to Evidence Code section 730. Although some counties directly appropriate funds in the public defender's budget for experts, that practice is subject to criticism as it places the public defender in a position of potential conflict or faced with the more costly option of declaring unavailability for appointment in cases requiring experts for lack of funds. In accordance with the provisions of Evidence Code section 730 an alternative methodology is for the court to determine the necessity of the requested expert, and to fix the amount of the compensation, which is to be paid by the county. This avoids the potential conflict defense counsel could face, and minimizes the necessity for counsel to declare unavailability on the basis of lack of funds for necessary experts. In Los Angeles the amount approved and paid by the County of Los Angeles for such experts exceeds \$9 million dollars annually. Few, if any, experts, are appointed pursuant to Evidence Code section 730 for the court's own use.

Accordingly, the Commission should not amend Evidence Code section 731 to provide that the costs of all experts in criminal and juvenile actions be the responsibility of the court. The costs of experts in all criminal actions and juvenile court proceedings other than the costs of experts for the court's own use, should continue to be required to be paid out of the treasury of the county on order of the court. The only appropriate change to Evidence Code section 731 would be to amend subdivision (a) thereof to read:

"(a) In all criminal actions and juvenile court proceedings, the compensation fixed under Section 730, other than court appointed experts for the court's own needs and use, shall be a charge against the county in which such action or proceeding is pending and shall be paid out of the treasury of such county on order of the court."

Catherine Bidart, Staff Counsel, California Law Revision Commission
Re: Law Revision Commission Study on Statutes Made Obsolete by Trial Court
Restructuring (Part 5)
August 27, 2009
Page: 3

Translators and Interpreters

As the Commission notes in its analysis, the employment of an interpreter for a witness in a criminal or juvenile case is a court operation cost (Cal. R. Ct. 10.810(d), Function 10), but that it is less clear whether court operations include employment of a translator of a writing offered in evidence.

Although the Commission has determined that employment of an interpreter for a witness in a criminal case is a court operation cost, it has left open the question of what services that includes. The Commission does not discuss providing an interpreter for a non-English speaking indigent defendant or to assist appointed counsel in interviewing a non-English speaking defendant in the adjacent court lockup as part of a court proceeding. A duty to provide a non-English speaking indigent defendant with an interpreter to understand the proceedings is consistent with the discretionary authority given the court to hire interpreters for criminal and civil proceedings (*See, e.g.*, Government Code section 26806(a)), and the requirements of Due Process. That authority can reasonably be construed to also include interpreter services closely related in time, place, and effect to courtroom proceedings, such as discussions between court appointed counsel and a non-English speaking defendant during short breaks in the court proceedings, or to assist counsel in such discussions just prior to court proceedings in courtroom adjacent lockups, but not to interviews at the jail or during lengthy breaks, such as lunch breaks. The costs of interpreter services outside of the courtroom proceedings, and not related closely in time, place and effect to courtroom proceedings should be treated as necessary defense costs, which should remain county charges pursuant to Penal Code section 987.2 and Government Code section 29602.

With regard to translation services, and without citing any authority therefor, other than a reference for the court's authority to appoint an expert "for its own needs" under Evidence Code section 731, discussed above, the Commission tentatively recommends revising Evidence Code section 731 to make the court responsible for translating a writing offered in evidence. However, such a construction is inconsistent with the obligation of the parties to provide the necessary information and foundation to make an exhibit admissible in evidence, which should include a translation, and with the provisions of Government Code section 29602, which provides that the expenses incurred "for all services in relation to criminal proceedings for which no specific compensation is prescribed by law are county charges."

Evidence Code section 753 authorizes a "sight translation" that, when required, can be performed by a court-employed interpreter who is not a translator. A "sight translation" is distinguishable from the typical documentary translation or translated transcript of non-English language voice recordings or documents. When a "sight translation" is conducted under section 753, the interpreter is sworn in as a witness and translates a document by testimony. Since the

Catherine Bidart, Staff Counsel, California Law Revision Commission

Re: Law Revision Commission Study on Statutes Made Obsolete by Trial Court
Restructuring (Part 5)

August 27, 2009

Page: 4

procedure is performed within the course and scope of the court-employed interpreter's employment, it is properly a court operation and not inconsistent with the provisions of the Trial Court Interpreter Employment and Labor Relations Act.

Nothing in Evidence code sections 730, 731, nor 753 support the Commission's recommendation that the court should be responsible for all translations of a writing offered into evidence.

In addition, many documents, such as discovery documents provided by the prosecution at the time of arraignment, may require translation. Since those documents are not at that time offered into evidence, and are merely lodged with the court to facilitate delivery of discovery to the defense, the court should not be required to translate those documents. Even though the court has the authority to employ interpreters to provide translation, it is not required to do so, as the statutory language is permissive and not mandatory. *See* Government Code section 26806, which provides that courts with populations over 900,000 "may" employ interpreters "to translate documents intended for filing in any civil or criminal proceeding," and which does not mandate that any such translation be done at court expense. The translation of documents to be filed with the court or submitted in evidence are expenses that should be incurred by the person seeking to file or admit such documents. The Commission's construction is inconsistent with the obligation of the parties to provide the necessary information and foundation to make an exhibit admissible in evidence, which should include a translation, and with Government Code section 29602, which provides that expenses incurred "for all services in relation to criminal proceedings for which no specific compensation is prescribed by law are county charges." To conclude otherwise would result in the necessity of the translation being determined exclusively by the parties and not by the court, and is inconsistent with the court's duty to determine the necessity of experts to be engaged "for the courts needs," as prescribed in the Rules of Court defining which expert costs are court operations costs. Cal. R. Ct. 10.810(d), Function 10.

The Los Angeles Superior Court currently does not assign interpreters to prepare written translations in litigation. In criminal and juvenile cases, the Court, pursuant to a motion, authorizes a party to obtain a translation to assist that party. Translations obtained pursuant to such an order are obtained by the parties who contract for the translation and pay the translator whatever fees have been negotiated for the service.

Proposed amendments to Government Code § 68092 would add subdivision (c) to provide that interpreters and translators' compensation shall be paid by the Court in criminal cases. Since translation fees are paid by the parties, such fees are not a court expense. Although it is appropriate to provide that the compensation of interpreters employed by the court and acting as such is paid by the court, it is not appropriate to make the compensation of translators a court expense as proposed.

Catherine Bidart, Staff Counsel, California Law Revision Commission

Re: Law Revision Commission Study on Statutes Made Obsolete by Trial Court
Restructuring (Part 5)

August 27, 2009

Page: 5

Proposed subdivision (b)(4) of Government Code § 69894.5 incorporates and amends subdivision (d) of Government Code § 26806 relating to the translation of documents. It incorporates existing provisions that authorize but do not require the court to assign a court-employed interpreter to translate documents. However, by the terms of the Trial Court Interpreter Employment and Labor Relations Act, court-employed interpreters are appointed to perform "spoken language interpretation of trial court proceedings," not translations. Government Code § 71802(a). As noted above, the Court does not currently exercise the authority in subdivision (d) of section 26806 to assign an interpreter to translate documents but instead authorizes a party to obtain a translation on an independent contractor basis between the party and the translator. The Court's interest is in ensuring that any amendments to section 69894.5 do not preclude this current practice.

Two additional issues do not appear to be of direct concern to the court but may be worth noting:

1. The first issue relates to the imposition of a fee when a court does exercise its authority to order translation pursuant to section 69894.5. Pursuant to subdivision (b)(4) of section 69894.5, a fee would be collected for translations performed pursuant to that section, which would be deposited into the Trial Court Trust Fund. The fee would be "determined by agreement between the court and the interpreter preparing the translation." It is not clear why the interpreter's agreement would be required in determining a fee to be imposed by the court and deposited into the Trial Court Trust Fund.

2. Provisions in subdivision (b)(1) of Government Code § 69894.5 authorizing a court to employ interpreters to translate documents may be inconsistent with provisions of the Trial Court Interpreter Employment and Labor Relations Act, which requires the court to employ interpreters to perform spoken language interpretation.

Very truly yours,



Frederick R. Bennett
Court Counsel

c: Hon. Charles W. McCoy, Jr., Presiding Judge
Hon. Lee S. Edmon, Assistant Presiding Judge
Hon. Michael Nash, Presiding Judge, Juvenile Court
Hon. Peter Espinoza, Supervising Judge, Criminal Division
John A. Clarke, Executive Officer/Clerk